FILED
DEC 13 1956
JOHN T. FEY, Clerk

No. 627

In the Supreme Court of the United States

OCTOBER TERM, 1956

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CALVIN L. RAMPTON
ZAR E. HAYES
WILLIAM G. MULLIGAN
Counsel of Record for Petitioner
Grant E. Hayes
721 Continental Bank Bldg.
Salt Lake City, Utah
BRYANT H. CROFT
Counsel of Record for Petitioner
Ronald J. McDonald
351 South State St.
Salt Lake City, Utah

INDEX

	Page
Opinions	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	3
1. The admissibility of evidence issue	5
2. The sufficiency of the indictment issue	6
3. The denial of due process of law issue	6
4. The sufficiency of the evidence issue	8
5. The instruction regarding circumstantial evidence issue	9
ARGUMENT ON REASONS FOR GRANTING WRIT	9
CONCLUSION	22
PROOF OF SERVICE	23
APPENDIX "A"	24
APPENDIX "B"	31

Cases Cited

Barcott v. U.S., 169 F(2d) 929, cert. den. 336 U.S. 912	21
Berra v. U.S., 100 L ed 563	13 & 14
Bihn v. U.S., 328 U.S. 633, 638-9 (1936)	13
Bryan v. U.S., 175 F (2d) 233	21
Curley v. U.S., 160 F(2d) 229, Cert. den. 331 U.S. 837	21
Dawes v. U.S., 177 F(2d) 255	21
Enrique Rivera v. U.S., 57 F(2d) 816	21
Epstein v. U.S., 174 F (2d) 754	21
Fiswich c. U.S., 329 U.S. 211, 91 L ed 196	13
Isabell v. U.S., 227 F. 788	20 & 21

INDEX (Continued)

Page

Jelaza v. U.S., 179 F (2d) 202 21
Lee v. Fleming, 158 F(2d) 984, Cert. den. 67 S. Ct. 1186, 331 U.S. 805, 91 L ed 1826 17
Leslie v. U.S., 43 F(2d) 288 ..... 20 & 21
Little v. U.S., 23 F(2d) 861 13
McCandless v. U.S., 298 U.S. 342, 347-8 (1936) 13
Magan v. U.S., 159 F(2d) 85 ..... 20 & 21
National Labor Relations Board v. Ford Motor Co., 114 F(2d) 905, Cert. den. 61 S. Ct. 612, 312 U.S. 689, 85 L ed 1126 17
Parnell v. U.S., 64 F(2d) 324 ..... 20 & 21
Schuermann v. U.S., 174 F(2d) 397, Cert. den. 338 U.S. 831 21
Spies v. U.S., 317 U.S. 492, 87 L ed 419 15
Sushan v. U.S., 117 F(2d) 110 12
U.S. v. Domres, 142 F(2d) 477, Cert. den. 65 S. Ct. 55; 323 U.S. 723, 89 L ed 581 18
U.S. v. Fenwich, 177 F(2d) 488 21
U.S. v. Laffman, 152 F(2d) 393 21
U.S. v. Spangnuolo, 168 F(2d) 768, cert. den. 335 U.S. 824 21

Statutes Cited

Sec. 305 of Act of Jan. 3, 1951, c. 1199 Title III, 64 Stat. 1220, 26 U.S.C.A. 53 ..... 3 & 10
26 U.S.C.A., 145 (a) 15
26 U.S.C.A., 145 (b) ..... 2, 3, 6, 13, 14 & 15
26 U.S.C.A., 3616 (a) ..... 2, 3, 14 & 15
28 U.S.C.A., 1253 (1) 2

Other Authorities

United States Constitution, Fifth Amendment 12

No.————————

In the Supreme Court of the United States

OCTOBER TERM, 1956

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners Grant E. Hayes and Ronald J. MacDonald respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cases November 17, 1956.

Opinions

There was no opinion in the District Court. The opinion of the Court of Appeals has not been reported and is set forth in the Appendix hereto. The opinion of the Court of Appeals in the first appeal is reported at 227 Fed. (2d) 540.

Jurisdiction

The judgment of the Court of Appeals was entered on October 16, 1956 (infra, Appendix A, p. 24). A petition for rehearing was denied on November 17, 1956 (Cir. Ct. R. p. 29). The jurisdiction of this Court is invoked under the provisions of 28 USCA 1254 (1).

Questions Presented

1. Whether it was error to admit into evidence a corporate income tax return when an act of Congress (infra, Appendix B, p. 32) provided that such return should not be considered as a return for any purposes of the Internal Revenue Code, or in the alternative to admit into evidence, over objection that it was a violation of the privilege against self-incrimination, a new return for the same year which was required to be filed anew by the said Act and which was offered as evidence of the falsity of the original return.

2. Whether the allegations of the indictment are sufficient to charge a violation of 26 U.S.C.A. 145(b), (1939 Code) or constitute only a violation of 26 U.S.C.A. 3616(a) (1939 Code).

3. Whether the bias and prejudice of the Court manifested throughout the trial constituted a denial of due process of law to petitioners.

4. Whether, upon a second appeal, the Court of Appeals can adhere to its ruling on the sufficiency of the evidence made on the first appeal and disregard any substantial evidence favorable to the defense received in the second trial and its affect on the question of wilfullness and the sufficiency of the evidence with respect thereto.

5. Whether, in cases involving charges of wilful attempts to evade taxes where the evidence of intent is circumstantial, it is error to refuse to give in substance a requested instruction to the effect that the evidence must not only be consistent with the inference of guilt but inconsistent with every reasonable hypothesis of innocence.

Constitutional Provisions and Statutes Involved

The constitutional provisions and statutes involved are the "due process of law" clause of the 5th Amendment to the Constitution of the United States, 26 U.S.C.A 145(b) and 26 U.S.C.A. 3616(a) (1939 Internal Revenue Code), and Section 305 of Act of January 3, 1951, c 1199, Title III, 64 Stat. 1220, 26 U.S.C.A. 53, all of which are set out in Appendix B, infra, pp. 24 to 32.

Statement of the Case

Petitioners Grant E. Hayes and Ronald J. McDonald were president and secretary respectively of the Grant E. Hayes Company, a corporation engaged in the business of buying and selling new and used cars, parts and accessories (T. 167). Three indictments charging violations of 26 U.S.C.A. 145(b) are involved, each containing four counts. In two of them Hayes and McDonald were separately charged with wilful attempts to defeat and evade a large part of their own indi-

vidual income taxes by filing false individual income tax returns for four separate years. In the third indictment petitioners were jointly charged with wilful attempts to evade taxes of the Grant E. Hayes Company by filing false corporate income tax returns for four separate years (Tr. 7-14).

The cases were consolidated for trial and following conviction on the first trial, Hayes was sentenced to imprisonment for 18 months and was fined $10,000.00. McDonald was fined $2,500.00 and received a similar sentence of imprisonment (Tr. 16-20). On appeal the Court of Appeals reversed and remanded the cases for new trials, solely upon the ground that the Court gave erroneous instructions as to the jury's consideration of character evidence (227 Fed. (2d) 540). Upon retrial, both petitioners were again convicted on all counts (Tr. 45-46). This time the court sentenced each to imprisonment for two years on each count, the sentences on seven of the eight counts on which each of the petitioners was convicted were made to run concurrently with each other. The sentence on the eighth count was made to run consecutively with the other counts, but execution of sentence on this count was suspended as to both petitioners and each was placed on probation for a period of five years, said period of probation to commence at the termination of the imprisonment or any period of parole that might be granted. Hayes was fined $30,000.00 ($3,750.00 on each count) and McDonald was fined $15,000.00 ($1,875.00 on each count.) The court directed that both be imprisoned until the fines were paid or until otherwise discharged as provided by law (Tr. 49-53). On appeal the judgments were affirmed (infra, Appendix A, page 24).

1. *The admissibility of evidence issue*:

The fourth count of the indictment charging petitioners with the alleged attempt to evade taxes of the Grant E. Hayes Company involved the corporate return for the fiscal year ending September 30, 1950 which was filed December 15, 1950. The original return filed reported a corporate tax due of $5,247.57 (T. 13). This return was received into evidence over objection of petitioners (T. 62), based upon the following considerations:

The excess profits tax had expired and was not reinstated by Congress until January 3, 1951. The tax as reinstated was made retroactive to June 30, 1950, and the Act required that corporations whose taxable year ended after June 30, 1950, but prior to December 31, 1950, should file a new return for such taxable year, and provided that no return for such taxable year filed on or before the date of the enactment of the Act (Jan. 3, 1951) should be considered as a return for any of the purposes of the Internal Revenue Code (Appendix B, page 32). Since this Act provided that the aforementioned corporate return (filed December 15, 1950) was no return for any of the purposes of the Internal Revenue Code, its introduction into evidence as a return to prove the allegations of this count was objected to by petitioners (T. 62).

Pursuant to and as required by the Act, another return for the year in question was filed by the Grant E. Hayes Company showing a total tax due of $23,205.28 (T. 223). The government offered this refiled return into evidence to prove the falsity of the first return. Since the trial court received the first return in evidence, the introduction of the refiled return was objected to on the grounds that, since it had to be refiled pursuant to an Act of Congress, its use as evidence by

the government was compulsory self-incrimination (T. 62). The question presented related to the admissibility of either or both of these two returns.

2. *The sufficiency of the indictment issue*:

The counts of all three indictments charged petitioners with violation of 26 USCA 145(b). The wording in each count was in the usual form and to the effect that the person or persons charged "did wilfully and knowingly attempt to defeat and evade a large part of the taxes due and owing" to the United States by filing "a false and fraudulent income tax return" wherein they understated the net income and the tax due thereon in varying amounts for each of the years in question. No other act than that of filing a false return was alleged to spell out the "attempt" (T. 7-14). The case was retried before the Supreme Court decision in Berra v. United States, ... U. S. ....., 100 L. Ed 563, was announced. The specific question as to the sufficiency of the indictments to charge a violation of Sec. 145 (b) was not raised in the trial court and was raised for the first time on appeal, but the court of appeals declined to decide the issue on the ground that the question was not properly before it. (Appendix A, p. 28).

3. *The denial of due process of law issue*:

Prior to the second trial, petitioners, moved by misgivings that they would not receive a fair and impartial trial from the same trial judge, filed a motion for a change of judge. The motion was denied (T. 26-27). During the second trial the trial judge repeatedly examined witnesses on his own initiative, stopped the petitioners on their examination and cross-examination of witnesses when no objection was imposed by the

government, on occasion directed the attorney for the government as to his interrogation of witnesses, frequently asked him to explain the significance of evidence before the jury, and generally conducted the prosecution from the bench (T. 64-68, 72-74, 77-81, 84-89, 96-101, 103-106, 108-109, 111-112, 114-115, 117-119, 121, 123, 124, 126, 128-129, 145). During the trial, when petitioners objected to certain testimony offered by the government as not the best evidence and when it appeared that the government had not subpoenaed the necessary records, the court recessed the trial, called counsel into chambers and advised counsel for petitioners that if counsel was going to insist on the best evidence rule, the court would require counsel for petitioners to have every record needed by the government in court by the time court convened the next morning and specifically identified as to record, page and line, or the court would permit secondary evidence to be given by the government witness. (See affvaidits (T. 3, 4, 5). On the morning of the fourth day of trial, a Friday, counsel for petitioners advised the court that the defense would probably rest its case that afternoon and requested that the court defer argument until Monday morning so argument and instruction could be given at the same time. The court stated it would do so (T. 4) but upon conclusion of the case, required argument to proceed late Friday afternoon, then recessed court until Monday morning at which time the court instructed the jury (T. 185-186). In its instructions, (T. 186-196) given some sixty hours after argument, the court reviewed the government's theories and evidence of the case, but said not a word about the evidence or theories of defense of petitioners, although exception was taken to such failure. Following conviction, the court in imposing sentence the second time, increased the prior sentences six months, added

a five year probationary sentence, and increased the fine originally imposed on Hayes by three times the original fine and on McDonald by six times the original fine (T. 16-20, 49-53). In doing so the court stated the case was more aggravated than it appeared on the first trial (T. 204). The records will not so show. The Court of Appeals dismissed the issue of bias and prejudice by saying "we find no merit in this contention." (Appendix A, p. 29).

4. *The sufficiency of the evidence issue*:

On the first appeal the Court of Appeals said that "there was an abundance of evidence to sustain the verdict." (Appendix A, p. 26). On the second trial petitioners placed into evidence, or insisted that the government place into evidence under the best evidence rule, several documentary exhibits (Exhibits 71, 72, A, B, C, D, O and P. T. 105-107, 241-243, 245) not offered at the first trial. Such evidence, together with testimony concerning the same, not only tended to show a lack of wilfullness, but also to prove that several items relied upon by the government in both trials did not constitute unreported income.

On the second appeal approximately one-half of petitioners' brief was devoted to the question of the sufficiency of the evidence introduced at the second trial including that not offered at the first trial. The matter was presented in detail, setting out a complete analysis of the government's evidence. It demonstrated that on at least one of the counts no additional tax was due and on another only about $8.00 additional tax was due. The brief also pointed out that many of the government's alleged items of unreported corporate income were not in fact items that constituted unreported income. This was not done on the first appeal. The second appeal presented

the facts in a light much more favorable to petitioners than on the first appeal.

The Court of Appeals dismissed consideration of the question on the second appeal in these words:

"No contention is made that the evidence on the second trial was more favorable to the defendants than on the first."

On the petition for rehearing, several erroneous statements of fact concerning the evidence made by the government in its brief on both appeals were brought to the attention of the appellate court. It was also specifically contended that new evidence was received and that the evidence on the second trial was much more favorable to petitioners than was contended upon the first appeal. Again the court refused to reconsider the question.

5. *The instruction regarding circumstantial evidence issue*:

There was no direct evidence of wilfullness in the case and proof of wilfullness was based upon circumstantial evidence. The petitioners requested the court to instruct the jury that circumstantial evidence must point so unerringly to the guilt of a defendant as to exclude every other "reasonable hypothesis" (T. 44). The court refused to give said instruction or to incorporate the substance thereof in the instructions given (T. 192-194).

ARGUMENT ON REASONS FOR GRANTING WRIT

1. As relates to the first question presented for review, the Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court. This question relates to the effect to be given to

Section 305 of the Act of January 3, 1951, c. 1199, Title III, 64 Stat. 1220, 26 U.S.C.A. Sec. 53. (For text of Act see Appendix page 32).

Count 4 of the indictment against the defendants Hayes and McDonald, as President and Secretary, respectively of Grant E. Hayes Company, charges defendants with willfully and knowingly attempting to defeat and evade a large part of the taxes due and owing by the Hayes Corporation for the fiscal year, October 1, 1949 to September 30, 1950 by means of filing a false return on or about December 15, 1950 (T. 13).

As a necessary part of the government's proof of fraud on such count, there was offered and admitted in evidence, over defendant's objection (T. 62) Exhibit 22, the corporate return filed on or about December 15, 1950 (T. 221). Thereafter, over objection of defendants (T. 62) Exhibit 23, the refiled 1950 return, was introduced and received in evidence. Defendants' objections to Exhibit 22, the original 1950 return, were based upon said Section 305 above referred to and particularly that part thereof reading as follows:

> "The return required by this section for such taxable year shall constitute the return for such taxable year for all purposes of the Internal Revenue Code; and no return for such taxable year, with respect to any tax imposed by Chapter 1 of such code (chapter 1 of this title) filed on or before the date of the enactment of this Act (Jan. 3, 1951) shall be considered for any of such purposes as a return for such year."

The objection to Exhibit 23, the refiled return for 1950 (T. 223) was upon the ground that it constituted self incrimination since defendants were required by law to file the same. The Circuit Court held there was no merit to defendants' contention (Cir. Ct. R. Page 5).

The purpose of Section 305 is readily apparent. The excess profits tax had expired and was not reinstated by Congress until January 3, 1951. The tax as reinstated was made retroactive to June 30, 1950, and in order to deal with corporations with fiscal years ending between June 30, 1950 and December 31, 1950, Congress required such corporations to refile their returns so that they could include therein any excess profits tax which might be owing.

Congress could not have been more explicit in disposing of the effect of the original return when it provided that the refiled return should be considered the return "for all purposes of the Internal Revenue Code" and that the prior filed return shall not be "considered for any such purposes as a return for such year."

The largest single item in the government's case was the difference between the tax payable as described by the original 1950 return (Exhibit 22) and the refiled 1950 return (Exhibit 23). As pointed out, the refiled return was not an amended return voluntarily filed. It was a new return for the same period, which the law compelled defendants to file, and the failure to do so would constitute a criminal offense. When the original return was filed the defendants believed it to be accurate and correct. By the time the law required them to file the new return they had become aware of errors in the first return and knew there was additional corporate income which should be reported. This was accurately reported on the refiled return and an addition tax of $17,957.75 was paid therewith, which when added to that paid with the original return totaled $23,205.28 or $2,893.18 more than the amount which the indictment claimed should have been paid. Had defendants filed the same information on the new return as was on the

first return, in the light of the information which they had at the time of filing the new return, they would have been guilty of filing a false return under the new filing. They should not be, and Congress surely did not intend, that defendants be placed in such position. As stated in Sushan v. United States, 117 Fed. (2d) 110:

> "So the maker of an income tax return under oath, if he does not wish to disclose any fact which may tend to incriminate him, ought to withhold it unless specifically forced thereto. Otherwise his disclosures ought to be esteemed voluntary."

In the case now before the Court these defendants were required to file the new return and were forced to place upon the face of the return the net income for the corporation for the fiscal period concerned as they then knew it to be. The government then based its charge on the first return and used the second return as evidence that the first return was false. This is compulsory self-incrimination of the clearest kind. It was evidently in an attempt to prevent this sort of situation that the Congress enacted the provision above cited to the effect that the first return should not be a return for any purposes within the Internal Revenue Code (and certainly 145(b) is part of the Internal Revenue Code).

It seems obvious that Congress saw the dilemma which taxpayers would face, and in order to prevent a situation which would violate the 5th Amendment to the U. S. Constitution, Congress required the filing of a new return but provided that no criminal charge could be made or based upon the return first filed. We submit that the language and provisions of Section 305 are clear in that regard.

While it is true that Exhibit 22 and 23 related to only one count in the three indictments, yet all of the indictments

were tied together and the essence of each was the willful attempt to defeat the income tax. Evidence on the crucial issue of wilfulness was not separated so that the jury could determine defendants' mental state for each count in each indictment. Since defendants were found guilty on all twelve counts which comprised the three indictments, it is not possible to say that the wilfulness which might have been found as a result of considering Exhibit 22 and 23 together did not influence the jury in their finding that the defendants were guilty on every count brought by the government.

As stated in Little vs. United States, 73 Fed. (2d) 861:

> " * * * * where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial * * * . The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

This doctrine was approved in McCandless vs. United States, 298 U.S. 342, 347-8 (1936); see also Bihn v. United States, 328 U.S. 633, 638-9 (1946) and Fiswich vs. United States, 329 U.S. 211 91 Lawyers Edition 196.

2. The second question submitted presents an important question of federal law which has not as yet been determined by this Court. It is predicated upon the holding of this Court in the case of Berra vs. United States, 100 Lawyers Edition 563, decided April 30, 1956, wherein the question was discussed but not decided as to whether a person charged with filing a false income tax return with intent to evade a substantial part of his income taxes may legally be charged, convicted, and sentenced under Section 145(b), Title 26 U.S.C.A. The de-

fendants in this action were so charged, convicted, and sentenced.

At the trial the defendants moved for judgment of acquittal on the grounds that the evidence was not sufficient to prove the offense charged (T. 198-199), however, not specifically mentioning the grounds as herein urged. On appeal this question was presented to the Court of Appeals. That Court declined to consider the matter, stating in referring to the Berra case:

> "In view of the Supreme Court's reluctance to approach the question when not properly before it, we shall do likewise. Under these circumstances we are reluctant to speculate on what the decision of the Supreme Court will be when the question is properly presented, particularly when the contention now raised, if sustained, would cut the heart out of Section 145(b) (Cir. Ct. R. 7).

In Berra vs. United States in the trial court, the only question presented by the defendant was whether or not the jury should have a choice as to which statute, if either, would apply to the defendant's acts. As indicated above, the defendants in the case now before the Court did move for judgments of acquittal on the grounds that the evidence was not sufficient to prove the offense charged, namely, violation of Section 145(b). This Court in the Berra case held that the acts complained of did clearly fall under the language of both Sections 145(b) and 3616(a), and because of the manner in which the question was raised, declined to consider the question as to whether the sentence and conviction were lawful. Nevertheless, the minority opinion pointed out clearly that the felony conviction could not be valid under Section 145(b) in view of the fact that such Section and the misdemeanor Section 3616(a) proscribe identical proof for conviction under either,

and hence there is no clearly defined penalty for the specific conduct complained of. There does not seem to be any basic difference between the majority and the minority opinion except procedurally.

Spies vs. United States, 317 U. S. 492, 87 Lawyers Edition 419, involved the relationship between Section 145(b) and 145(a). Section 145(a) makes it a misdemeanor to wilfully fail to make a return or pay a tax, whereas, as pointed out above, Section 145(b) makes it a felony to wilfully attempt, in any manner, to evade or defeat any tax. The court held that were it not for the existence of Section 145(a) failure to file a return would come within the provisions of Section 145(b). The language of the Court in this regard is as follows:

> "Had Section 145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns, keep records, or supply information—duties imposed to facilitate administration of the Act even if, because of insufficient net income, there were no duty to pay a tax. It would then be permissible and perhaps an appropriate construction of Section 145(b) that it made felonies of the same wilful omissions when then was the added element of duty to pay a tax."

The Court went on to hold, however, that in view of the existence of Section 145(a), offenses falling within that statute were in effect carved out from the operation of Section 145(b). The conviction was reversed. Exactly the same situation prevails here.

We submit that under the reasoning of the Berra and Spies cases, it is clear that one of two situations exist, namely, (a) that the filing of a false return with intent to evade income taxes, being within the terms of Section 3616(a) is carved

out of Section 145(b) even though it would otherwise be a violation of that Section; or (b) that by reason of the two sections proscribing identical proof but different punishments, there is no clearly defined conduct and punishment prescribed. In either event, it seems clear that the conviction under Section 145(b) should not be legally upheld.

Where such a grave and important constitutional question is presented, so seriously affecting the rights and liberties of citizens, and which question is certain to occur and reoccur time and time again until settled, we submit that this Court should brush aside any possible technical or procedural blocks and fully determine the matter.

3. The fair and impartial administration of criminal justice in federal courts requires that this court exercise its supervisory powers to review a denial of the constitutional right to due process of law by a biased and prejudiced trial court. After going through one trial that was reversed upon appeal, petitioners, being fearful that they would not receive a fair and impartial trial before the same trial judge, moved for a change of trial judge. The motion was denied (T. 26-27). Such fears were not groundless. The record manifests the determination of the trial judge that petitioners be again convicted.

The very substantial increase of the sentences imposed following conviction on the second trial shocked the bar and people of Utah and was interpreted everywhere as being an additional punishment to petitioners for having appealed and obtained a reversal after the first trial. The review of the case by this court thus becomes important, particularly to the people of Utah, for if the trial court is upheld in its conduct in these cases, not only will it give the trial court further license to assume a role of prosecutor, but future defendants convicted

in the trial court below will be fearful of exercisng their right to appeal lest a successful appeal will mean a more severe punishment.

True, the sentences imposed were within the statutory limits and petitioners do not now take the position that following reversal of a conviction on appeal that the trial court should be limited to the sentence first imposed. But in this case, prison sentences were increased, the fines imposed on Hayes were increased three times from $10,000.00 to $30,000.00 and those imposed on McDonald were increased six times from $2,500.00 to $15,000.00, and in addition, five year probationary sentences following imprisonment were added. This unconscienable increase evidences the strong bias and prejudice of the court against petitioners.

To one not present at the trial, the bias and prejudice of the court must be shown by the cold facts of the printed record. The conduct of the court as set out in the statement of facts is found in that record. To sustain such conduct will be to deny due process of law to these petitioners and jeopardize the fair and impartial administration of criminal justice for the future.

It is a fundamental concept of "due process of law" that parties to a controversy are entitled to have their issues determined by an impartial tribunal. (Lee v. Fleming, 158 F2d 984, Cert. den. 67 S. Ct. 1186, 331 U.S. 805, 91 L Ed. 1826). A trial by a biased judge is not in conformity with due process of law. (National Labor Relations Board v. Ford Motor Co., 114 F2d 905, Cert. den. 61 S. Ct. 621, 312 U.S. 689, 85 L.Ed. 1126). The accused is entitled to be tried by a fair and impartial judge, who shall maintain his role of judge and not

assume the role of prosecutor. (U. S. v. Domres, 142 F2d 477, Cert. den. 65 S. Ct. 55, 323 U.S. 723, 89 L. Ed. 581).

These are sound principles that must be preserved. The difficulty of trying a case in an atmosphere of bias and prejudice is evident to all who have had such an experience. In this era of complicated tax laws, which at times confound the best minds of our judicial system, the importance of preserving the rights of the individual charged with tax evasion to a fair and impartial trial, by a judge and before a jury, takes on added significance.

The Court of Appeals found only that the court "was interested in having some complicated matters explained in such a manner that they would be clear to court or jury." (Appendix A, p. 29). Did the trial court have that interest when it repeatedly interfered with petitioners' examination of witnesses without any objection to such examination by the prosecution, or when it demonstrated more interest in the government proving its case than it did in the best evidence rule, or in compelling argument more than sixty hours before it intended to submit the case to the jury, or in its one-sided instructions to the jury? In sustaining this conduct, the court of Appeals sanctions a far departure from the accepted and usual course of judicial proceedings.

4. In the second trial of these cases, a substantial amount of new material evidence was introduced on behalf of petitioners that was not used in the first trial. New additional counsel was brought into the case and on the second trial it was and can be mathematically shown that much of the government's evidence accepted as proof of unreported income on the first trial did not in fact show unreported income. The additional new evidence and these new and corrected con-

cepts of the government's evidence and its failure to show unreported income were brought to the attention of the Court of Appeals on the second appeal in a detailed analysis of all the evidence. But the Court of Appeals disregarded it by a baseless observation that no contention was made that the evidence was more favorable to appellants than on the first appeal (Appendix A, p. 26). The more favorable position of the evidence and petitioners' contentions with respect thereto, together with several erroneous statements of material facts made by the government in its briefs on both appeals, were again brought to the attention of the Appellate Court by the petition for rehearing. Again the Court of Appeals disregarded it.

Individual rights should not be dismissed so lightly. Trials and appeals in trials of this nature are costly. But cost is of little significance when petitioners' liberty and reputation are at stake and American citizens fail to receive a fair hearing from our federal courts. Appeal is a matter of right in our judicial system. That right carries with it the right to have appellate courts consider matters raised on appeal on facts established in the trial on which the appeal is taken. We asked only for a fair consideration of our case in the Court of Appeals. We did not receive it. It is imperative that this Court, in the exercise of its powers of supervision of lower courts, not permit a Court of Appeals to disregard new facts and new evidence in considering any case on a second appeal.

5. With regard to the fifth question presented for review, we suggest that the decision rendered in this case by the Court of Appeals, Tenth Circuit, is not only in conflict with the decisions of the others Courts of Appeals with regard to the same subject, but is inconsistent with prior decisions of the Court of Appeals of the Tenth Circuit relating thereto.

The question presented relates to what instructions should be given in cases involving charges of willful attempts to evade taxes where the evidence of intent is circumstantial. Relying upon the cases of Magan, v. U. S., 159 F (2d) 85; Isabell v. U. S., 227 Fed. 788, Leslie v. U. S., 43 F (2d) 288, and Parnell v. U. S., 64 F (2d) 324, the defendants assumed that the rule in the Tenth Circuit should require the trial court to submit an instruction upon the so-called "reasonable hypothesis" rule. In line with that, the defendants requested the court to instruct as follows:

> "Certain evidence has been introduced by the Government which is largely circumstantial and as such may be used as a basis for your findings only if it measures up to the standards required by law. Such circumstantial evidence must point so unerringly to the guilt of a defendant as to exclude every other reasonable hypothesis, and each of the circumstances must be proved to your satisfaction beyond a reasonable doubt. These circumstances must be consistent with each other and inconsistent with any other hypotheses except the guilt of the defendant.
>
> "If, therefore, upon a consideration of all the evidence, you find there exists a reasonable hypothesis which might indicate the defendant's innocence, in the absence of direct evidence satisfying you beyond a reasonable doubt of the defendant's guilt, then I instruct you to find the defendants 'not guilty'." (T. 44).

The court not only failed to give the instruction requested but refused to give the substance of the instruction. At no time did the Court instruct the jury that it was their duty to reconcile the circumstantial evidence with the hypothesis of innocence if it could be so reasonably reconciled. The court rather instructed the jury in effect that all that was necessary was the filing of a false return, without regard to the numerous

circumstances presented in evidence which would indicate there was no intent to defraud. (T. 192-194).

It seems that there has for some time been a conflict in the rule followed in the various Circuits as regards the weight and effect to be given circumstantial evidence and as to what instructions should be given relating thereto in criminal cases. It is our understanding that the "reasonable hypothesis" rule had always been followed in the First (Enrique Rivera v. U.S., 57 F(2) 816; the Third (U. S. v. Tatcher, 131 F(2) 1002; U. S. v. Laffman, 152 F(2) 393; the Fifth (Bryan v. U. S., 175 F (2) 223); the Sixth (Epstein v. U.S., 174 F (2) 754; Dawes v. U. S., 177 F (2) 255); the Seventh (U. S. v. Fenwick, 177 F(2) 488); and the Tenth Circuits (Magan v. U. S. Supra; Isabell v. U. S. Supra; Leslie v. U. S. Supra; and Parnell v. U. S. Supra); and that the substantial evidence rule had been followed in the Second (U. S. v. Spangnuolo, 168 F(2) 768, Cert. denied 335 U. S. 824); the Fourth (Jelaza v. U. S., 179 F(2) 202); the Eighth (Schuermann v. U. S., 174 F(2) 397, Cert. denied 338 U. S. 831); the Ninth (Barcott v. U.S., 169 F(2) 929, Cert. denied 336 U. S. 912); and the District of Columbia Court of Appeals (Curley v. U. S., 160 F(2) 229, Cert. denied 331 U. S. 837).

In the case now before the Court the instructions of the trial court did not meet either the reasonable hypothesis rule or the substantial evidence rule, but totally ignored any instruction requiring the jury to take into consideration evidence submitted on behalf of the defendants going to the question of their intent and the reasons and state of mind underlying any acts which they did in connection with the filing of their returns. Whether the Court of Appeals of the Tenth Circuit has now abandoned the reasonable hypothesis rule cannot be

determined from the opinion rendered. The important fact remains that what the rule concerning circumstantial evidence of intent ought to be should be decided by this Court.

We strongly urge that this court should resolve the conflict in the rule existing in the various Circuits, and set down a proper and uniform rule to be followed by the United States District Courts and Courts of Appeal throughout the United States as relates to circumstantial exidence of intent in criminal cases.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari issue out of this Court to the Court of Appeals for the Tenth Circuit in this matter.

Respectfully submitted,

CALVIN L. RAMPTON
ZAR E. HAYES
WILLIAM G. MULLIGAN
Counsel of Record for Petitioner
Grant E. Hayes
721 Continental Bank Bldg.
Salt Lake City, Utah

BRYANT H. CROFT
Counsel of Record for Petitioner
Ronald J. McDonald
351 South State St.
Salt Lake City, Utah

PROOF OF SERVICE

We, ZAR E. HAYES and BRYANT H. CROFT of counsel of record for appellants and members of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of December, 1956, we served, on behalf of appellants herein, copies of the foregoing Petition for Writ of Certiorari as follows:

1. On the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.

.....

ZAR E. HAYES

.....

BRYANT H. CROFT
Of Counsel of Record for Petitioners

APPENDIX "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GRANT E. HAYES, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5347

RONALD J. McDONALD, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5348

Appeals from the United States District Court For The District of Utah, Central Division

GRANT E. HAYES, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5349

RONALD J. McDONALD, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee. — Number 5350

Calvin L. Rampton and Byrant H. Croft, of Salt Lake City, Utah, (Zar E. Hayes and William G. Mulligan, Salt Lake City, Utah, were with them on the brief), for Appellants;

C. Nelson Day, Assistant United States Attorney, Salt Lake City, Utah, (Charles K. Rice, Assistant Attorney General, Joseph M. Howard, Attorney, Department of Justice, and A. Pratt Kesler, United States Attorney, Salt Lake City, Utah, were with him on the brief), for Appellee.

BEFORE HUXMAN, MURRAH, and PICKETT, United States Circuit Judges.

PICKETT, Circuit Judge.

These appeals are from judgments and sentences following the conviction of the defendants on three indictments charging them with wilfully and knowingly attempting to defeat and evade income taxes by filing and causing to be filed false and fraudulent returns, in violation of Sec. 145(b) of the Internal Revenue Code of 1939, (26 U.S.C.A. Sec. 7201, 1954 Code). The indictments were in four counts, each charging violations for the years 1947, 1948, 1949, and 1950, and were in connection with the personal income tax returns of the defendants and the corporate returns of Grant E. Hayes Company, of which the defendant Hayes was President, and the defendant McDonald was Secretary. The cases were consolidated for trial, and the defendants were first tried and convicted on each count of the three indictments. On appeal from the judgment and sentences, we reversed and remanded the cases for new trials, solely upon the ground that the court gave erroneous instructions as to the jury's consideration of character evidence. 227 F. 2d 541. Upon retrial, the defendants were again convicted on all counts of the indictments, and were duly sentenced upon such convictions. Several assignments of error are now urged, some of which were considered on the first appeal.

A considerable portion of appellants' brief is devoted to the sufficiency of the evidence to sustain the verdict. It is conceded that the evidence on the second trial is substantially the same as that of the first trial. On the former appeal, we said that "there was an abundance of evidence to sustain the verdict." No contention is made that the evidence on the second trial was more favorable to the defendants than on the first. The record discloses that there was some additional evidence in the second trial tending to support the charges. As

to the sufficiency of the evidence, we adhere to the views expressed in our former opinion.

It is also urged that we reconsider our conclusion as to the admissibility of the corporation's income tax return for the year 1950. Sec. 305 of the Act of January 3, 1951, 64 Stat. 1220, 26 U.S.C.A. 53, 1939 Code, requires corporations subject to the Act to file amended returns for the year 1950, and that no return for such taxable year with respect to any tax imposed by Chapter 1 of such Act filed on or before its effective date "shall be considered for any such purposes as a return for such year." For the reasons stated in the opinion on the former appeal, the exhibit was admissible.[1]

For the first time, the defendants contend in this Court that the indictments do not charge, and the evidence does not establish, facts constituting a violation of Sec. 145(b). This section provides, in part, that "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony. * * * ". Sec 3616(a) of the Internal Revenue Code of 1939, (26 U.S.C.A. Sec. 7207, 1954 Code), provides that whenever any person

---

1. In the opinion of the first appeal, 227 F. 2d 541, 542-3, we said:

"The offense of filing a fraudulent return for the purpose of evading income taxes is complete when the accused wilfully filed a false return, and as stated, there is nothing in the Act of January 3, 1951, indicating that by the passage of that Act Congress intended to wipe out or forgive such offenses. Had the original income tax return for the year 1950 not been admitted, the Government would have been unable to establish that a false and fraudulent return had been filed with respect to revenue not affected by Section 305 of the Act of January 3, 1951. The original corporation income tax return for the year 1950 was properly admitted in evidence." (Footnote omitted).

delivers to the collector "any false or fraudulent list, return, * * * with intent to defeat or evade the valuation, enumeration or assessment intended to be made; * * * shall be fined not exceeding $1,000, or imprisoned not exceeding one year, * * * ".

Referring to the language of the Supreme Court in Berra v. United States, 351 U. S. 131, and the rule of Spies v. United States, 317 U.S. 492,[2] the appellants say that the end result of these decisions is that a prosecution cannot be had under Sec. 145(b) for the filing of a false and fraudulent income tax return to evade or defeat taxes, and the prosecutions for the filing of such returns are limited to Sec. 3616(a). It is urged that we consider this question for the first time on appeal because of clear error affecting the substantial rights of the parties. Ordinarily, in criminal cases where substantial rights of a defendant are affected, we would not hesitate to consider the question, although not previously raised. However, the Supreme Court, in the Berra case, had the identical question before it and did not exercise its right to consider the question even though the defendant in that case had been sentenced to a term of four years under Sec. 145(b), which was three years more than a sentence permitted under Sec. 3616(a)[3].

---

2. The Spies case held that the willful omission to file a return and pay a tax as defined in Sec. 145(a), a misdemeanor, cannot be made the basis for a violation of Sec. 145(b), which makes it a felony to wilfully attempt to evade or defeat income tax.

3. In holding that the only question before it was that of a failure to give an instruction, the Supreme Court in the Berra case, 351 U.S. 131, 132-3, said: "No motions addressed to the validity of the indictment, judgment of conviction, or sentence under Sec. 145(b) were made before, during, or after trial, * * * ". The defendant did, however, offer an instruction which referred to the right to convict under either Sec. 145(b) or Sec. 3616(a). In the case here, liability under Sec. 3616(a) was not called to the attention of the trial court in any manner.

In view of the Supreme Court's reluctance to approach the question when not properly before it, we shall do likewise. Under these circumstances, we are reluctant to speculate on what the decision of the Supreme Court will be when the question is properly presented, particularly when the contention now raised, if sustained, would cut the heart out of Section 145(b).[4]

The record discloses that the defendants filed twenty requests for instructions. The failure to give some of these instructions, or the substance thereof, is assigned as error, specifically those dealing with circumstantial evidence, reasonable doubt, and intent. At the conclusion of the Court's instructions to the jury, the defendants took exception to certain instructions given, and stated that they further excepted to the failure of the Court to give a substantial portion of the requested instructions, referring to them only by number. Federal Rules of Criminal Procedure, Rule 30, provides in part that "no party may assign as error any portion of the charge or omission therefrom, unless he objects thereto before the the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury." This portion of the rule is substantially the same as that of Rule 51 of the Federal Rules of Civil Procedure. The clear purpose of these rules is to require the objecting party, after the Court's instructions have been given, to call particular attention to errors in instructions and to state

---

4. The effect of the Berra decision on prosecutions under Sec. 145(b) was recently considered by the 2nd Circuit in two cases. Felony sentences for filing false returns with intent to evade taxes were sustained. United States v. Moran, ... F. 2d.; H. J. K. Theatre Corp. et al. v. United States, ... F. 2d .....

the grounds therefor. This permits the correction of any error in instructions given or refused before the jury retires. We have repeatedly held that the correctness of instructions will not be reviewed on appeal unless the objection is made before the jury retires to consider its verdict,[5] in which objection the grounds must be stated distinctly. Jones v. Koma, Inc., (10 Cir.) 218 F. 2d 530; Solorio v. Atchison, T. & S Fe R. Co., (10 Cir.) 224 F. 2d 544. We have also held that in making objections, reference to instructions by number does not meet the requirements of the rule. Garden City v. Burden, (10 Cir.) 186 F. 2d 651. See also Lloyd v. Thomas (9 Cir.) 195 F. 2d 486; Marshall v. Nugent, (1 Cir.) 222 F. 2d 604; Hansen v. St. Joseph Fuel Oil & Mfg. Co., (8 Cir.) 181 F. 2d 880, Cert. den. 340 U. S. 865. Because of the nature of this case, we have given careful consideration to the instructions as a whole, including those relating to intent and reasonable doubt, and we are satisfied that they adequately and fairly stated the law as it related to the facts of these cases, and none of them is clearly erroneous, and the jury was not misled in any respect.

Finally, the defendants assert that the conduct of the trial judge during the trial of the case, by his comments, manner, and demeanor, prejudiced the rights of the defendants and prevented them from having a fair trial. We find no merit in this contention. While the Court did at times question the witnesses and counsel for both parties, we find no indication of prejudice toward either side. The most that can be said is that the Court was interested in having some rather difficult and involved matters explained in such a manner that they would be clear to the Court and the jury. It is said that this

---

5. We do mean by this that the jury must be in the jury box when the objections are made, but they must be made before it retires to consider its verdict.

bias and prejudice is manifested by the Court's action in giving greater sentences and fines upon the second conviction than on the first. The Court gave as the reason for these different penalties his belief that the conduct of the defendants was more aggravated than he thought after the first trial. The fixing of penalties for crimes is a Congressional function, and what constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual. Rose v. United States, (10 Cir.) 128 F. 2d 622, cert. den. 317 U. S. 651; Edwards v. United States, (10 Cir.) 206 F. 2d 855. The sentences imposed were not cruel and usual.

Affirmed.

APPENDIX "B"

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Amendment V

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * * "

26 U.S.C.A. Section 145(b) (INTERNAL REVENUE CODE 1939)

"Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

26 U.S.C.A. SECTION 3616(a) (INTERNAL REVENUE CODE 1939)

"Whenever any person — (a) Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000 or be imprisoned, not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

SECTION 305 OF ACT JANUARY 3, 1951, C. 1199, TITLE III, 64 STAT. 1220, 26 U.S.C.A. SEC. 53, 1939 CODE.

"In the case of a corporation subject to the tax imposed by sub-chapter D of chapter 1 of the Internal Revenue Code (sub-chapter D of Chapter 1 of this title) for a taxable year ending after June 30, 1950, but prior to December 31, 1950, such corporation shall after the date of the enactment of this Act (Jan. 3, 1951) and before March 15, 1951, make a return for such taxable year with respect to the tax imposed by chapter 1 of the Internal Revenue Code (chapter 1 of this title) for such taxable year. The return required by this section for such taxable year shall constitute the return for such taxable year for all purposes of the Internal Revenue Code; and no return for such taxable year, with respect to any tax imposed by chapter 1 of such code (chapter 1 of this title) filed on or before the date of the enactment of this Act (Jan. 3, 1951) shall be considered for any of such purposes as a return for such year. The taxes imposed by chapter 1 of such code (chapter 1 of this title) (determined with the amendments made by this Act) for such taxable year shall be paid on March 15, 1951, in lieu of the time prescribed in section 56 (a) of such code (section 56(a) of this title). All payments with respect to any tax for such taxable year imposed by chapter 1 of such code under the law in effect prior to the enactment of this Act, to the extent that such payments have not been credited or refunded, shall be deemed payments made at the time of the filing of the return required by this section on account of the tax for such taxable year under chapter 1 (chapter 1 of this title) determined with the amendments made by this Act."

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	4
Argument	10
Conclusion	14

CITATIONS

Cases:

United States v. *Achilli*, 234 F. 2d 797, 352 U.S. 1916	12
Berra v. *United States*, 351 U. S. 131	12
United States v. *Doyle*, 234 F. 2d 788, 352 U.S. 893	12
Hayes v. *United States*, 227 F. 2d 540	5
Holland v. *United States*, 348 U. S. 121	14
United States v. *Beacon Brass Co.*, 344 U. S. 43	11
United States v. *Moran*, 236 F. 2d 361, certiorari denied, 352 U.S. 909	12
United States v. *Sullivan*, 274 U. S. 259	12

Statutes:

Internal Revenue Code of 1939:	
Sec. 145 (26 U.S.C. 1952 ed., Sec. 145)	2, 11, 12
Sec. 3616 (26 U.S.C. 1952 ed., Sec. 3616)	3, 12
Excess Profits Tax Act of 1950, Sec. 305	3, 11

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 627

GRANT E. HAYES AND RONALD J. McDONALD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals affirming petitioners' convictions on retrial (Pet. 24-30) has not yet been reported. The previous opinion of the Court of Appeals, reversing the convictions after the first trial, is reported at 227 F. 2d 540.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1956, and a petition for rehearing was denied on November 17, 1956. The petition for certiorari was filed December 13, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting in evidence the original 1950 return of the Grant E. Hayes Company, a corporation, and the amended return subsequently filed in compliance with Section 305 of the Excess Profits Tax Act of 1950.

2. Whether the indictments, which alleged that petitioners had wilfully attempted to evade income taxes by filing false returns, charged offenses under Section 145 (b) of the Internal Revenue Code of 1939.

3. Whether the conduct of the trial judge indicated bias and prejudice against petitioners.

4. Whether the evidence was sufficient to support the verdict.

5. Whether the trial court was required to give a specific instruction, in addition to the usual instruction on reasonable doubt, to the effect that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt.

STATUTES INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof,

shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 3616.)

EXCESS PROFITS TAX ACT OF 1950, c. 1199, 64 Stat. 1137:

SEC. 305. FILING OF RETURNS FOR TAXABLE YEARS ENDING AFTER JUNE 30, 1950, AND BEFORE DECEMBER 31, 1950.

In the case of a corporation subject to the tax imposed by subchapter D of chapter 1 of the Internal Revenue Code for a taxable year ending after June 30, 1950, but prior to December 31, 1950, such corporation shall after the date of the enactment of this Act and before March 15, 1951, make a return for such taxable year with respect to the tax imposed by chapter 1 of the Internal Revenue Code for such

taxable year. The return required by this section for such taxable year shall constitute the return for such taxable year for all purposes of the Internal Revenue Code; and no return for such taxable year, with respect to any tax imposed by chapter 1 of such code, filed on or before the date of the enactment of this Act shall be considered for any of such purposes as a return for such year. The taxes imposed by chapter 1 of such code (determined with the amendments made by this Act) for such taxable year shall be paid on March 15, 1951, in lieu of the time prescribed in section 56(a) of such code. All payments with respect to any tax for such taxable year imposed by chapter 1 of such code under the law in effect prior to the enactment of this Act, to the extent that such payments have not been credited or refunded, shall be deemed payments made at the time of the filing of the return required by this section on account of the tax for such taxable year under chapter 1 determined with the amendments made by this Act.

STATEMENT

On January 9, 1954, three four-count indictments were returned in the United States District Court for the District of Utah, charging petitioners individually with wilful attempted evasion of their respective income taxes, and jointly with attempted evasion of the income taxes of the Grant E. Hayes Company, a corporation, for the years 1947 to 1950, inclusive, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 7-14):

GRANT E. HAYES

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947).....	$24,009.73	$ 7,945.65	$34,101.84	$14,108.64
Count II (1948).....	14,527.97	2,545.78	38,951.23	11,408.94
Count III (1949).....	4,839.20	429.81	8,770.73	1,300.91
Count IV (1950).....	15,238.23	2,574.90	52,772.48	18,017.38

RONALD J. McDONALD

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947).....	$ 3,177.11	$ 417.01	$ 4,632.96	$ 721.29
Count II (1948).....	7,150.23	1,041.56	11,106.63	1,874.64
Count III (1949).....	6,321.27	881.27	8,160.97	1,237.24
Count IV (1950).....	7,174.64	1,091.32	8,962.71	1,449.30

GRANT E. HAYES COMPANY

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947).....	$40,542.27	$13,308.63	$53,643.76	$20,384.63
Count II (1948).....	38,412.33	13,219.69	58,501.48	22,230.56
Count III (1949).....	31,787.92	9,904.47	45,590.44	16,662.94
Count IV (1950).....	22,486.15	5,247.57	54,250.50	20,312.10

Petitioners were convicted after a jury trial but the judgments were reversed on appeal because of an erroneous instruction on the effect to be given the evidence as to petitioners' good reputation. *Hayes* v. *United States,* 227 F. 2d 540, 544-545. After retrial petitioners were again found guilty by a jury on the eight counts which applied to them respectively. Hayes was sentenced to concurrent terms of imprisonment for two years and fined $3,750 on each count, while McDonald received the same sentence of imprisonment and was fined $1,875 on each count. Service of imprisonment was suspended as to one count and petitioners were placed on probation for five years, to commence at the termination of the other sentences. (R. 46-53.)

The evidence to support the verdicts may be summarized as follows:

Petitioner Hayes was president and owner of all but two shares of the stock of Grant E. Hayes Company, a corporation which dealt in new and used cars. (R. 60, 167, 177, 179.) Petitioner McDonald was secretary of

the corporation and was in charge of the books and records. (R. 60, 153-154.)

Between December 10, 1946, and February 24, 1947, the Studebaker Corporation sent Grant E. Hayes Company seven volume discount payments, totalling about $8,000, which were not recorded on the Grant E. Hayes Company books. Three of these checks were deposited in Hayes' personal account at the Continental Bank and Trust Company. The remaining checks were deposited in the Grant E. Hayes Company account at the same bank. None of these checks was reported as income either in the company returns or in Hayes' personal return. (R. 62-67, 74, 94, 112, 113, 227-228.) In 1947 the Studebaker Corporation inaugurated a new system of making volume discount payments. Within 90 days after the end of the model year Studebaker Corporation was to send to each dealer one check for the volume discount earned during the entire year, the amount depending upon the number of cars sold. The following schedule shows the amount of the volume discounts thereafter received by the company and deposited in the company bank account, the amount reported on the company returns and the amount unreported (R. 62-67, 106, 107):

Date	Check Number	Received and Deposited	Reported	Unreported
12/29/47	30547	$ 9,053.96	$ 4,798.88	$ 4,255.08
3/29/49	34772	11,285.16	6,818.19	4,466.97
11/16/49	37259	11,351.35	7,696.27	3,655.08
	Totals	$31,690.47	$19,313.34	$12,377.13

Between May 26, 1947, and August 19, 1950, the parts and accessories expense account was charged with eleven checks totalling about $40,000, which were not used for the purchase of parts and accessories. Of the ten check stubs, eight indicated payment to Stude-

baker Corporation, one recorded payment to Western Avenue Motor Equipment Company, and one showed payment to Schramm's Auto Service. The check stubs recorded the purchase of anti-freeze, radios, climatizers, automatic transmissions and other parts and accessories. No such purchases had in fact been made. Checks in amounts identical with the check stubs were deposited in other bank accounts including Hayes' personal bank accounts. These amounts were deducted on the company income tax returns as parts and accessories expense. (R. 63, 94, 104, 105, 113, 147-153, 209-211.)

Whenever Grant E. Hayes Company sold a conditional sales automobile contract to Pacific Finance Corporation, the latter company discounted the contract price and set aside a part thereof as a repossession loss reserve to the credit of Grant E. Hayes Company. Later the unused portion of the repossession loss reserve, totalling about $14,000, was returned to Grant E. Hayes Company. The checks were deposited in the Continental Bank, one of them going in Hayes' personal account. Less than one-half of this income was reported on the company returns. (R. 67-70, 84-90, 107, 113, 216.)

On March 12, 1948, Hayes personally borrowed $20,000 from Continental Bank, putting up as security property at 648 South State Street, Salt Lake City, Utah. The terms of the loan called for payments of $300 each month. Seven $300 payments and three other payments of $500, $645, and $425 were made by Grant E. Hayes Company. The $300 payments were charged to rent. The other payments were charged to parts and accessories. These expenditures were taken as deductions on the company returns. The payments were received by Continental Bank and were credited to

Hayes' loan account. This income to Hayes was not reported on his return. (R. 70-75, 147.)

In August and September, 1950, $4,272.39 was accumulated in a delivery and handling account. This sum was withdrawn by three company checks and was deposited in one of Hayes' personal bank accounts. None of this amount was reported either in the company's original return for 1950 or in Hayes' personal return. (R. 102, 108, 109, 160, 240.)

The Continental Bank was used for the deposits of the Studebaker volume discount payments, the deposits of Pacific Finance Company checks representing the dealer reserve account, the payments on Hayes' personal obligation which were charged on the company books to rent or to parts and accessories, and payments to Ronald J. McDonald other than his salary. These transactions were segregated from routine matters which were handled through the First Security Bank. From the numbers on the checks it appears that approximately 12,000 checks went through the First Security Bank during the period of the four years involved. During the same period eighty checks were drawn on the company account in the Continental Bank. (R. 145, 151, 165, 168, 212-214.) Each month the bank statements from Continental Bank were examined personally by Hayes (R. 151, 169.) Although a firm of accountants headed by J. N. Casella, C. P. A., prepared each of the income tax returns for Hayes and the Grant E. Hayes Company (R. 82), Casella's firm was not told about the Continental Bank account nor the special income items that went into that account (R. 157, 173).

On each of Hayes' income tax returns, the only items of income listed were his regular monthly salary of $1,000 from the Grant E. Hayes Company, plus regular bonus payments to him which were listed in the

company books, and miscellaneous capital gains which are not material to this case. (R. 226). None of the items described as having been deposited in his personal bank accounts were reported in his personal tax returns. (R. 113.)

Ronald J. McDonald had no source of income other than that received from Grant E. Hayes Company. His regular salary checks drawn by the company on the First Security Bank were reported in his returns. The amounts which were paid to him out of the Continental Bank were not reflected in the company records and were not reported in his income tax returns. (R. 114, 144, 226, 227.)

During the investigation petitioners attempted to deceive the examining agents as to the deposits in and withdrawals from the Continental Bank account. (R. 133-136, 152, 179, 183.)

McDonald testified about the Continental Bank account, the items that passed through this account, and the reason for not recording these items. In substance he said that the items that went into the Continental account were the unusual items; they were large payments by Studebaker Company to Grant E. Hayes Company; they were also large payments by Pacific Finance Company to Grant E. Hayes Company; they were not the regular day to day transactions; they were not recorded on the company books, but in the Continental Bank account. (R. 145, 146.) McDonald testified that he did not record the Studebaker volume discount payments because he "had a bad balance to start with". (R. 146, 151.) The Pacific Finance Company checks were handled (R. 146) the same way and if Mr. Hayes needed money he would give them to him (R. 153, 161). In stating the reason why he charged the parts and ac-

cessories account for items in fact had not been purchased, McDonald testified (R. 148, 153) that he wanted to get his book inventory in accord with actual inventory (although he didn't take any actual inventory) and the only method he could devise to do it was to pad the parts and accessories purchases and give the amounts by checks to Hayes. He stated that he placed the various notations on the check stubs to deceive Hayes and made the checks out to Hayes in odd amounts so it would appear that tax deductions had been made. (R. 148, 152, 153.)

Grant E. Hayes testified that during the years involved his personal bank account varied (R. 175) anywhere from $15,000 to $50,000. With regard to the company checks issued to him Hayes testified that he thought such payments were bonus payments to him and he felt positive that the withholding tax had been taken out of such payments, although he never once in the four year period had any discussion with McDonald with regard to such checks and payments. (R. 170, 174, 175, 177, 182, 183.) The only conversation he could recall with McDonald with regard to such checks was that McDonald would ask him if he could use any money and he would tell McDonald that he could. (R. 175.) Although he was particularly interested in keeping close watch over the "reserves" in the Continental Bank account (R. 168, 178-179) he was not interested in the tax returns. He looked at the Continental Bank account statements every month; he said that he did not ever examine his annual income tax returns. (R. 174, 178.)

ARGUMENT

1. The fiscal year of the corporation ended on September 30, and its original 1950 return was filed on December 15. (R. 221.) The corporation was re-

quired, under the provisions of Section 305 of the Excess Profits Tax Act of 1950 (*supra*, pp. 3-4), to file an amended 1950 return before March 15, 1951, and this was ultimately filed on April 7, 1952.[1] (R. 223.) Both were introduced in evidence by the Government. (R. 62.) Petitioners argue (Pet. 2, 5-6, 9-13) that the original return should have been excluded because the Act specifically provides that it shall not be considered a "return" for any purpose under the Internal Revenue Code, and that the amended return should have been excluded because, in filing it, they were required to incriminate themselves by stating the correct 1950 income of the corporation. There is no merit in either branch of the argument.

The false original 1950 corporate return was certainly a "return" when it was filed on December 15, 1950, and the offense of wilful attempted evasion of the corporate income taxes became complete, as the Court of Appeals points out (Pet. 26), at that time. Although the original return was deprived of its character as a "return" by the subsequent enactment of the Excess Profits Tax Act of 1950 on January 3, 1951, that did not remove the criminality of the original act of filing, for Section 145(b) of the Internal Revenue Code of 1939 (*supra*, pp. 2-3) punishes, not simply the filing of false returns, but any act of wilful attempted evasion of income taxes. *United States* v. *Beacon Brass Co.*, 344 U. S. 43. That the original filing constituted such a wilful attempt is clear, and although the Excess Profits Tax Act rendered the return itself a nullity for the purpose of computation of the corporate tax, there is nothing in the

[1] The investigation which ultimately led to the bringing of these indictments had been begun a year and a half earlier, in the fall of 1950. (R. 134.)

Act to indicate that Congress intended to wipe out offenses committed prior to the date it became effective. As the Court of Appeals noted in its first opinion (227 F. 2d 540, 542), the purpose of the Act was simply to reimpose the excess profits tax, which had expired June 30, 1950, for the last six months of that year, and to require all corporations which had filed returns during that period to recompute their taxes and file new returns.

The argument that the filing of the new return constituted a violation of the privilege against self-incrimination has long since been rejected by this Court. *United States* v. *Sullivan,* 274 U. S. 259.

2. It is urged (Pet. 2, 6, 13-16) that the allegations of the indictment did not constitute a violation of the felony provision (Section 145 (b), supra, pp. 2-3), but at most amounted to a charge under the misdemeanor statute (Section 3616(a), *supra,* p. 3). Since petitioners admit (Pet. 6, 14) that they did not specifically raise this issue in the trial court,[2] we submit that they have no standing to raise it here. This Court refused to pass on the question in *Berra* v. *United States,* 351 U. S. 131, because it had not been properly raised in the trial court by an attack upon either the indictment or the sentence. And this Court has denied the writ in other cases in which the issue had not been properly preserved. *United States* v. *Doyle,* 234 F. 2d 788 (C.A. 7), certiorari denied, 352 U.S. 893; *United States* v. *Achilli,* 234 F. 2d 797 (C.A. 7), certiorari denied, 352 U.S. 916; *United States* v. *Moran,* 236 F. 2d 361 (C.A. 2), certiorari denied, 352 U.S. 909.

---

[2] The motions for acquittal (R. 137-140, 197-198) obviously did not raise the issue.

3. There is no merit in the contention (Pet. 2, 6-8, 16-18) that the trial judge exhibited such bias and prejudice against petitioners as to deprive them of due process of law. Of course the mere fact that the judge imposed heavier sentences after the second trial than after the first does not indicate bias. Petitioners do not contend that following a reversal on appeal and a retrial, the trial court should be limited to sentences initially imposed (Pet. 17). The second set of sentences were well within the allowable maximum; the Government's evidence (*supra,* pp 5-10) clearly establishes that the evasions were flagrant; and the trial judge specifically explained, in imposing sentence (R. 204-205), that, having heard the evidence a second time, he was more impressed than he had been previously by the amounts of taxes evaded and by the aggravated nature of the offense.

Examination of those portions of the record cited by petitioners (Pet. 7) discloses that the complaints about the trial judge's interruptions of counsel, and about his insistence that counsel agree on the manner in which corporate records were to be presented, are baseless. The trial judge was clearly trying to expedite matters (cf. R. 94-101) and to clear up difficult issues, and his asperity, if any, was directed more against Government counsel than against the defense. Defense counsel made no objection when the court decided to go ahead with argument to the jury on Friday afternoon (R. 185), and an examination of the charge to the jury (R. 186-196) reveals that the judge did not discuss the theory and the evidence of the prosecution, but contented himself with a general statement of the applicable principles of law.

4. Petitioners assert (Pet. 3, 8-9, 18-19) that new evidence was produced at the second trial which demonstrated their innocence and which the Court of Appeals failed to review. But the petition certainly does not demonstrate this, for the alleged new evidence does not appear therein. We submit that the evidence adduced by the prosecution and summarized above (pp. 5-10) amply supports the verdicts of guilty.

5. Nor is there merit in the final contention (Pet. 3, 9, 19-22) that the trial court should have given petitioners' requested instruction (R. 44) to the effect that the Government's circumstantial evidence must be such as to exclude every reasonable hypothesis other than that of guilt. The court properly charged the jury on the requirement of proof beyond a reasonable doubt (R. 195-196), and, as this Court held in *Holland* v. *United States,* 348 U. S. 121, 139-140, no more is required.

CONCLUSION

The decision of the court below is clearly correct, and no question calling for review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
Attorney.

JANUARY, 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 412044 7-13

No. 627

FIL
JAN 2
JOHN T. PE

In the Supreme Court of the United States

OCTOBER TERM, 1956

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

GRANT E. HAYES,
vs. Petitioner,
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
vs. Petitioner,
UNITED STATES OF AMERICA,

REPLY TO BRIEF IN OPPOSITION

CALVIN L. RAMPTON
ZAR E. HAYES
WILLIAM G. MULLIGAN
Counsel of Record for Petitioner
Grant E. Hayes
721 Continental Bank Bldg.
Salt Lake City, Utah

BRYANT H. CROFT
Counsel of Record for Petitioner
Ronald J. McDonald
351 South State St.
Salt Lake City, Utah

No. 627

In the Supreme Court of the United States

OCTOBER TERM, 1956

GRANT E. HAYES,
Petitioner,
vs.
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
Petitioner,
vs.
UNITED STATES OF AMERICA,

GRANT E. HAYES,
Petitioner,
vs.
UNITED STATES OF AMERICA,

RONALD J. McDONALD,
Petitioner,
vs.
UNITED STATES OF AMERICA,

REPLY TO BRIEF IN OPPOSITION

The brief of the United States in opposition to the petition for a writ of certiorari has brought up new matters of significance not adequately treated in the petition and this reply is submitted pursuant to the provisions of Rule 24(4) of the Supreme Court Rules.

1. On page 12 of its Brief the Government makes the flat statement that the petitioners' argument to the effect that the use of the new filed return as evidence against it was rejected

by this Court in the case of United States v. Sullivan, 274 U. S. 259. This is not true. The Sullivan case did not in any way pass upon the matter here presented. In the Sullivan case, the defendant was accused of failure to file an income tax return. He defended it upon the grounds that had he filed the return, the return would have revealed the fact that he was engaged in illicit traffic in liquor, and the Court held that this was not a defense to the failure to file a return. The facts in that case are not at all comparable to the case before this court. The petitioners in this case did file a return as the law required. They are now objecting to the use of that return, which they were compelled to file, as evidence against themselves. Had the defendant in the Sullivan case actually filed his return and then been charged with violation of the Volstead Act and his income tax return used as evidence against him, the Sullivan case might be near to our case on its facts.

It is our contention that Congress, by the provision which it put into Section 305 of the Excess Profits Act of 1950 intended to avoid a situation where the taxpayer would be compelled to make a refiled return and then have such return used in evidence against him when charged with making false statements in his original return.

2. At the bottom of page 13 of its Brief, the government maintains that the trial judge did not discuss the theory of the evidence of the prosecution while declining to so discuss the evidence and the theories of the defense. This matter can best be resolved by the court itself by a reading of the court's instructions contained on page 193 of the printed record in the Circuit Court.

3. The fourth question presented in the Petition (Pet. 3) and considered therein (Pet. 18, 19) was changed by the

government in its brief to the question of "whether the evidence was sufficient to support the verdict" (Br. 2), which is an entirely different question than that actually presented by the petitioners, namely, whether or not on a second appeal the Court of Appeals could totally disregard any substantial new evidence received at the second trial and refuse to consider the question of sufficiency of the evidence.

The petitioners had no thought that this court would consider the sufficiency of the evidence in connection with their petition for a Writ of Certiorari, but since the government has raised the question in its brief, and more particularly because it has a direct bearing upon the question as to whether there was substantial new and additional evidence in the second trial which should have been considered by the appellate court, the inadequacies and inaccuracies of the government's statement of the case can hardly go unanswered.

The petitioners' contention that the Court of Appeals erred in failing to review the question of the sufficiency of the evidence in view of the new evidence presented was disposed of by the government by asserting that the "alleged new evidence does not appear therein" (Br. 14). Petitioners' Statement of the Case identifies the exhibits received as new evidence in the second trial (Pet. 8) and the nature and importance of such evidence will appear more fully in the discussion that follows.

In considering the fourth question, the government's brief also states that the summary of the evidence set out in its brief (pp 5-10) "amply supports the verdicts of guilty" (Br. 14). That might be true if this alleged summary were both accurate and complete, but it is neither, for the government's summary contains some very material misstatements and omis-

sions of fact. Similar misstatements appeared in the government's briefs filed in the Court of Appeals upon both appeals. (Pet. 9).

On the surface one of the most damaging bits of evidence was proof that eleven checks written by McDonald[1] were erroneously entered on the check stubs by him as having been issued for the purchase price of parts and accessories (T. 109, 124, 209) (Br. 6, 7). When so entered, these entries on the check stubs were transferred to the book inventory of parts and accessories (T. 153). The brief in opposition mentions these facts (Br. 6, 7). Then, to put the stamp of fraud upon them, the brief states that "these amounts were deducted on the company income tax returns as parts and accessories expense" (Br. 7). If this were true it would, of course, be clear evidence of willful tax evasion, but the simple, mathematical truth, as shown by the evidence, is that these amounts were never taken as deductions for parts and accessories expense on the tax returns. The deductions for such expenses that were taken on the tax returns were computed by *taking a percentage* (based upon experience and periodic tests) *of the actual sales of parts and accessories made* (T. 149, 242). The special agent, advised of this, made no attempt to check the accuracy of the percentages used (T. 125). Neither the parts inventory as shown on the books, which was increased by entries from the eleven checks, nor checks actually written for the purchase of parts were ever used to compute the deductions taken. It is a simple, mathematical fact that the corporate income would have been no different than as reported, regardless of whether these eleven checks had either never been written or actually

(1) Ten went to Hayes and one was used to transfer funds from the First Security Bank to the Continental Bank account of the Grant E. Hayes Co.

had been issued for the purchase of parts. The erroneous entries on the check stubs made by McDonald only increased the book inventory. That is all it did and that is all it was intended by McDonald to do (T. 150). On October 1, 1946, the book inventory was only $7,150.00, far below what McDonald knew it to be from actual observation of parts on the shelves (T. 127, 148). In an effort to get the book inventory of parts back into more keeping with what he believed it to be, McDonald padded the book figures in the manner indicated (T. 148), but it didn't reduce taxable income and the government's contention that it did is erroneous. The same situation prevails with respect to the three checks of $500, $645, and $425, mentioned on page 7 of the brief in opposition.

Petitioner's exhibits A, B, C and D (T. 241, 242) consisting of records showing how the costs of parts sold were computed, and which support the above facts, were a part of the new evidence received upon the second trial which was not considered on the first appeal.

After pointing out that Studebaker Corporation discount checks and Pacific Finance Company repossession loss reserve checks were deposited in the Continental Bank account of the Grant E. Hayes Company (one went to Hayes' personal account) (Br. 6, 7, 8) the government's brief then states that "although a firm of accountants headed by J. N. Casella, C.P.A., prepared each of the income tax returns for Hayes and the Grant E. Hayes Company (R. 82) Casella's firm was not told about the Continental Bank account . . ." (Br. 8).

This also is not true. Each year a trial balance was sent to the Casella firm for the preparation of the corporate income tax return[1]. Each year the first item listed on the first

(1) The trial balances were placed in evidence by the government itself (T. 238).

page of each of the said trial balances was the Continental Bank account (T. 238). Each year page 2 of the general ledger reflected the existence of this account (T. 241). The company books were used in the preparation of the returns (T. 226). In fact, the Casella firm itself set up the corporate books in 1945 and included a record of and for the Continental Bank account in doing so (T. 145-6). But the government, with reckless abandon, alleges the account was secret and places the stamp of fraud upon the alleged secrecy.

The government's brief points out that seven $300 payments made to the Continental Bank on a personal loan of Mr. Hayes "were charged to rent," and that these "expenditures were taken as deductions on the company returns" (Br. 7). No mention is made that these seven payments were legitimate rental expenses paid to Hayes for use by the company of a used car lot purchased and owned by Hayes (T. 147). To further stamp these rental checks, and the three checks of $500, $645, and $425 mentioned above, with fraud, the government erroneously states that these checks were drawn on the so-called "secret" account in the Continental Bank (Br. 8). This, too, is not so, as these checks were all drawn on the First Security Bank account, the check stubs of which were furnished to the government by petitioners and introduced into evidence as government's Exhibit 1 (T. 209).

The government states that of three checks received from the Studebaker Corporation totaling $31,690.47, $19,313.34[1] was reported and $12,377.13 was unreported (Br. 6). This is

---

(1) Government's Exhibit 71 (Tr. 240) was placed into evidence upon petitioners' insistence under the best evidence rule (T. 106) and shows how the reported income was accumulated. This evidence was not considered by the Court of Appeals on the first appeal.

true. The unreported income, together with seven volume discount checks totaling approximately $8,000.00 (Br. 6), the unreported receipts from the Pacific Finance Corporation (Br. 7) (actual amount is $8,399.19) and the $4,272.39 accumulated in the delivery and handling account (Br. 8), all represent unreported income of the corporation. The government's brief mentions each of these items, but it failed to mention the fact that checks totaling $20,385.39 drawn on the Continental Bank account (T. 212-214) constituted deductible expenses which were not claimed on the corporate income tax returns but which offset a substantial part of this unreported income (T. 130, 182). A failure to report income used to pay unclaimed deductible expenses hardly smacks of willful tax evasion.

Unreported corporate income from the Pacific Finance Corporation is mentioned (Br. 7) as evidence of fraud, but no mention is made in the brief in opposition that the same erroneous bookkeeping methods used by McDonald to accumulate reserves from this company on the books that led to this omission also resulted in an *overstatement* of corporate income from this company in the first fiscal year involved (T. 107, 117.[1] The government ignores this overstatement of income one year but shouts fraud at the understatement the next. Unreported income resulting from erroneous bookkeeping methods, unaccompanied by tax evasion motives, should not be the basis for criminal liabilities.

The brief of the government states that checks payable

---

(1) Government's Exhibit 72 (T. 241) placed in evidence as part of the records insisted on by petitioners under the best evidence rule (T. 94 et seq), are records proving this fact, and were not considered by the Court of Appeals on the first appeal.

to McDonald from the Continental Bank account were not reported on his income tax returns (Br. 9). But no mention is made of the fact that the sums so paid were given to reimburse McDonald for out-of-pocket expenses incurred on behalf of the Hayes Company and as such were not income to him (T. 142, 143, 170); or that they were all deposited in his personal bank account by deposit slips that reflected that the deposits were Grant E. Hayes Company checks drawn on the Continental Bank account (T. 231). No mention is made by the government that for the year 1948, even assuming the expense checks were income, the evidence established an unreported income of only $39.40, instead of $3,956.40 as alleged (T. 114, 132, 133).

The government stresses the fact that Hayes "did not ever examine his annual income tax returns" (Br. 10). In doing so it fails to point out that a firm of C.P.A.'s had prepared his returns for many years and he had the greatest confidence in them (T. 172).

New evidence not presented at the first trial disclosed that these two men, whom the government alleges were willfully evading taxes, brought on the investigation by filing a $75.50 claim for refund (Ex. O, T. 245), then signed a consent for assessing the taxes (Ex. P, T. 245) to give the agent more time for making his investigation (T. 142). The investigation began before the 1950 returns were filed (T. 134), and, at the request of Mr. Hayes, the year 1950 was included in the investigation (T. 184, 185). The year 1950 was included in the indictment. No mention was made by the government of such facts.

The misstatements and omissions of such important evidentiary matters by the government compelled the submission

of this reply. Similar misstatements of fact by the government in its briefs have plagued petitioners on both appeals in the Court below. They should not do so here.

CONCLUSION

The petitioners again urge that there are substantial questions raised in the Petition for Certiorari that require the granting of the Writ and review of the case by this court.

Respectfully submitted,

CALVIN L. RAMPTON
ZAR E. HAYES
WILLIAM G. MULLIGAN
Attorneys for Petitioner
Grant E. Hayes

BRYANT H. CROFT
Attorney for Petitioner
Ronald J. McDonald

PROOF OF SERVICE

We, ZAR E. HAYES and BRYANT H. CROFT of counsel of record for petitioners and members of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of January, 1957, we served on behalf of appellants herein, copies of the foregoing reply on the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah at Room 200 Federal Building, Salt Lake City, Utah, and by mailing three copies in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D. C.

.....

ZAR E. HAYES

.....

BRYANT H. CROFT
Of Counsel of Record for Petitioners